

Entered on Docket

April 29, 2021

EDWARD J. EMMONS, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA



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The following constitutes the order of the Court.

Signed: April 29, 2021

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William J. Lafferty, III

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6 William J. Lafferty, III
7 U.S. Bankruptcy Judge

8

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

10

OAKLAND DIVISION

11

12 In re)	Lead Case No. 18-42169 WJL
13 GERALYNNE MARIE LONGMIRE,)	Chapter 7
14 Debtor.)	Adversary Proceeding No. 18-04110
15)	
16 JUDD KESSLER,)	
17 Plaintiff,)	HEARING HELD
18 v.)	DATE: February 17, 2021
19 GERALYNNE M. LONGMIRE,)	TIME: 10:30 a.m.
20 Defendant.)	LOCATION: 220
		1300 Clay Street
		Oakland, CA 94604
		VIA TELECONFERENCE

21

22

OPINION

23 William J. Lafferty, III, U.S. Bankruptcy Judge

24 This matter came for hearing via teleconference on
25 February 17, 2021, on the Motion for Partial Summary Judgment
26 ("MPSJ") filed by Defendant Geralynne M. Longmire ("Defendant").
27 Alexander J. Kessler of the law firm Grant & Kessler, APC appeared
28 for Judd Kessler, Trustee of Ingodwe Trust, the Plaintiff

1 ("Plaintiff") in this action. Hugo Torbet appeared for the
2 Defendant. At the conclusion of oral argument the Court took the
3 matter under submission. For the reasons set forth below, the
4 Court GRANTS the MPSJ in part, and DENIES it in part, as moot.

5 **I. FACTUAL BACKGROUND**

6 In early 2016, Defendant needed to refinance a maturing loan
7 secured by real property at 215 El Pinto in Danville, California
8 (the "Property") that she owned and served as her residence. She
9 engaged Russell Roesner ("Roesner"), a real estate broker, to
10 assist her in this effort. Roesner reached out to Plaintiff, a
11 very experienced real estate lender of whom Roesner had become
12 aware through mutual acquaintances, to see if he would be willing
13 to make a short-term loan, at a high interest rate, secured by the
14 Property. The loan was, ostensibly, to be a "bridge" loan, to
15 provide Defendant with time to sell or refinance the Property.

16 As part of the process of documenting the loan transaction,
17 Defendant executed certain documents which were provided for
18 Plaintiff's review by Roesner, and were delivered to Plaintiff at
19 the closing of the loan. These documents included a Business
20 Purpose/Commercial Loan Application (the "Loan Application"), a
21 Borrower's Certification & Authorization ("Borrower's
22 Certification"), a Declaration of Occupancy, an Occupancy
23 Statement, and a Borrower's Purpose Statement. Defendant also
24 provided Plaintiff with a copy of a Final Opinions of Value
25 performed by Associates Appraisal Group in Irvine, California that
26 represented the market value of the Property, as of May 11, 2015,
27 to be \$2,520,000 (the "Appraisal"). The Loan Application, the
28 Appraisal, the Borrower's Certification, the Declaration of

1 Occupancy, the Occupancy Statement, and the Borrower's Purpose
2 Statement will each be described in greater detail infra, and may
3 be referred to, collectively, as the "Loan Documents."

4 In addition to the Loan Documents, and after a telling
5 exchange of emails between Roesner and Defendant and between
6 Roesner and Plaintiff, Roesner also delivered to Plaintiff a letter
7 from Defendant dated March 8, 2016 (the "March 8 Letter") that
8 described Defendant's intention to vacate the Property and to
9 reside with her mother at 110 Kingswood Circle, Danville,
10 California.

11 In the course of the pre-funding discussions and negotiations,
12 Roesner also delivered numerous emails to Plaintiff describing
13 Defendant's circumstances, the need for a loan, and the terms
14 requested (amount, duration, interest rate).

15 After resolving a subordination issue that is of no
16 consequence to this matter, the Plaintiff and the Defendant's
17 transaction (the "Loan") closed on March 25, 2016. The Loan was in
18 the principal amount of \$1,850,000, with an annual interest rate of
19 10.9 percent, and a term of six months. Regular monthly payments
20 were \$16,804.17.

21 As will also be described in greater detail below, Plaintiff
22 asserts that Defendant made numerous false statements in the Loan
23 Documents, including with respect to her income, the value of the
24 Property, her residence at the Property and her purpose in
25 obtaining the Loan.

26 Defendant failed to make any payments on the Loan, and did not
27 sell or refinance the Property. As a result, Plaintiff exercised
28 his right under a Deed of Trust to foreclose on the Property in

1 February 2017, and, when Defendant failed to vacate the Property,
2 Plaintiff filed an unlawful detainer action to evict her.
3 Eventually, Plaintiff obtained \$1,810,000 at a sale conducted on
4 February 28, 2018, an amount that was considerably less than the
5 amount then due on the Promissory Note that Defendant had provided
6 to Plaintiff.

7 Plaintiff commenced an action in state court against Defendant
8 and Roesner, based on issues similar to those asserted in this
9 proceeding. Roesner defaulted in that action, and reached a
10 settlement with Plaintiff whereby Roesner sold his home and paid
11 Plaintiff a significant amount to resolve the fraud claims against
12 him.

13 Defendant filed a voluntary petition for relief under chapter
14 7 of the Bankruptcy Code on November 13, 2018.

15 Plaintiff initiated this adversary proceeding by filing a
16 Complaint on November 13, 2018, followed by an Amended Complaint on
17 November 30 (for convenience, the "Complaint"). The Complaint
18 raises five nondischargeability causes of action under 11 U.S.C. §
19 523(a)(2). Plaintiff's First, Second, and Third Claims for Relief
20 allege that Defendant made false representations regarding her
21 place of residence, the value of the Property, and Defendant's
22 income. The Fourth Claim for Relief alleges that Defendant
23 committed loan fraud, although this Claim for Relief was dismissed
24 without leave to amend by the Court in its Order Granting in Part
25 and Denying in Part Defendant's Motion to Dismiss. Order Granting
26 & Den. Def.'s Mot. Summ. J. 2, ECF No. 54. Finally, the Fifth
27 Claim for Relief asserts that Plaintiff's anti-SLAPP fee awarded in
28

1 state court is nondischargeable under § 523(a)(6) as arising from
2 Defendant's willful and malicious acts.

3 As this Opinion disposes of the First, Second, and Third
4 Claims for Relief, only the Fifth Claim for Relief remains for
5 further disposition. Although the Court previously denied
6 Defendant's Motion for Partial Summary Judgment on the Fifth Claim
7 for Relief, Defendant has continued to question the basis for that
8 ruling, albeit without seeking to appeal that ruling or to move the
9 Court for "reconsideration" under Federal Rules of Bankruptcy
10 Procedure 9023 or 9024. Since Defendant's counsel's assertions
11 about the Court's prior ruling reveal a profound and abiding
12 misunderstanding of the relevant legal principles and the case law
13 articulating those principles, as a courtesy to the parties, the
14 Court will shortly hereafter issue a further Memorandum on those
15 issues.

16 The Court notes that Plaintiff's Complaint suffers from being
17 conclusory and imprecise as to when false statements were made, who
18 made them, and which statements were made orally and which in
19 writing. However, Defendant did not file a motion to dismiss based
20 on such vagaries, or for a more definite statement, and the
21 Complaint remains the operative document for deciding the
22 Defendant's MPSJ. To the extent that issues not raised in the
23 pleadings have been modified by the parties' express or implied
24 consent, as allowed under Rule 15 of the Federal Rules of Civil
25 Procedure, and in a light most favorable to the non-moving party,
26 the Court will treat those issues as raised by the pleadings and
27 determine them accordingly. Fed. R. Civ. P. 15(b)(2); *United*
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1 *States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 804 (9th Cir.
2 2017).

3 **II. PROCEDURAL BACKGROUND**

4 On January 28, 2020, at the request of the Court in order to
5 establish the amount of damages recoverable, if any, in this action
6 under fraud theories, Plaintiff filed a Motion for Summary Judgment
7 Re Damages (the "Plaintiff's Damages Motion") against Defendant,
8 which was set for hearing on February 25. Mot. Summ. J. Re
9 Damages, ECF No. 93. Subsequently, Defendant filed a Motion for
10 Partial Summary Judgment (the "523(a)(6) Motion"), solely
11 addressing Plaintiff's 11 U.S.C. § 523(a)(6) claim, the Fifth Claim
12 for Relief, and a Counter Motion for Summary Judgment (the "Counter
13 Motion"). 523(a)(6) Mot., ECF No. 95; Counter Mot., ECF No. 108.
14 The Court heard all three motions on February 25, denying
15 Defendant's 523(a)(6) Motion and taking the Plaintiff's Damages
16 Motion and Defendant's Counter Motion under submission.

17 On April 10, 2020, the Court entered an Order on Plaintiff's
18 Damages Motion and Defendant's 523(a)(6) Motion and Counter Motion,
19 in which the Court made a number of findings and conclusions,
20 before directing the parties to provide further briefing as to two
21 discreet issues concerning the measure of damages. Order Pl.'s
22 Damages Mot. & Def.'s 523(a)(6) Mot. & Counter Mot., ECF No. 130.
23 After multiple delays and continuances related to the pandemic, the
24 parties finally submitted their additional briefing between
25 September 30 and October 21. After reviewing the parties'
26 briefing, the Court found that it could not rule as a matter of law
27 due to the briefing not being entirely responsive and remaining
28

1 factual disputes, and denied each party's Motion for Summary
2 Judgment Re Damages.¹

3 In the meantime, on February 26, 2020, Defendant filed her
4 MPSJ, and supporting declarations and pleadings, and set it for
5 hearing on March 25, 2020. Def.'s MPSJ, ECF Nos. 119-24. On March
6 7, the Court issued an Order Granting Plaintiff's Ex Parte Motion,
7 which removed Defendant's MPSJ from the calendar until Plaintiff's
8 Damages Motion and Defendant's Counter Motion were addressed.
9 Order Granting Ex Parte Mot., ECF No. 127. After denying
10 Plaintiff's Damages Motion and Defendant's Counter Motion, the
11 Court scheduled a Status Conference for January 6, 2021. At the
12 Status Conference, the Court agreed to schedule briefing and oral
13 argument on Defendant's MPSJ. Plaintiff submitted his Opposition
14 ("Plaintiff's Opposition") on January 27, 2021, along with an
15 Objection and Motion to Strike the Declaration of Russell Roesner
16 ("Plaintiff's Objection"), Defendant filed a Reply ("Defendant's
17 Reply") on February 3, and the Court heard oral argument on
18 February 17. Pl.'s Opp'n, ECF No. 153; Pl.'s Obj. & Mot. Strike,
19 ECF No. 154; Def.'s Reply, ECF No. 155. This Opinion responds to
20 the briefing and oral argument on Defendant's MPSJ.

21 **III. RELEVANT LEGAL STANDARDS**

22 Summary judgment is appropriate when the record shows that no
23 genuine dispute of material fact exists, and the moving party is
24 entitled to judgment as a matter of law. *Fresno Motors, LLC v.*
25 *Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). The

26
27 ¹ In any event, based on the Court's disposition of the First, Second and
Third Claims for Relief in this Opinion, there will be no claims for damages on
those claims, and the issues addressed in the Motions for Summary Judgment Re
Damages are moot.

1 moving party must support its position by "citing to particular
2 parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A).
3 If the moving party carries its burden of production, the non-
4 moving party must produce enough evidence to create a genuine issue
5 of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*
6 *Cos., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000) (citation omitted).
7 Facts that affect the ultimate outcome of the case, under
8 substantive law, are material facts. *Anderson v. Liberty Lobby,*
9 *Inc.*, 477 U.S. 242, 248 (1986).

10 At this stage "the judge's function is not himself to weigh
11 the evidence and determine the truth of the matter but to determine
12 whether there is a genuine issue for trial." *Anderson*, 477 U.S. at
13 249. "Where the record taken as a whole could not lead a rational
14 trier of fact to find for the non-moving party, there is no genuine
15 issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
16 *Radio Corp.*, 475 U.S. 574, 587 (1986).

17 **IV. PLAINTIFF'S OBJECTION TO ROESNER'S DECLARATION IS OVERRULED.**

18 As a preliminary matter, the Court must address Plaintiff's
19 Objection. Pl.'s Obj., ECF No. 154. Plaintiff claims that
20 Roesner's declaration (the "Roesner Declaration") should be struck
21 and not considered due to a lack of credibility. Plaintiff alleges
22 that Roesner was suffering from mental health issues around the
23 time of the Declaration and that Roesner holds personal animosity
24 toward Plaintiff, due to a judgment Plaintiff obtained against him.
25 Plaintiff further objects on the basis that Plaintiff was not able
26 to cross-examine Roesner about his Declaration. Plaintiff's
27 Objection is supported by the declaration of Plaintiff's counsel
28 ("Alex Kessler's Declaration").

1 The Court does not find any good grounds to strike Roesner's
2 Declaration. First of all, as Defendant noted in her Reply,
3 Roesner's Declaration was already submitted in support of both
4 Defendant's 523(a)(6) Motion and Counter Motion without objection
5 from Plaintiff, and both of those matters have been decided by the
6 Court.

7 Second, declarations may be used to support a summary judgment
8 motion, so long as they are "made on personal knowledge, set out
9 facts that would be admissible in evidence, and show that the . . .
10 declarant is competent to testify on the matters stated." Fed. R.
11 Civ. P. 56(c)(4). Plaintiff has not alleged that Roesner's
12 Declaration was not made on personal knowledge or that the facts
13 set out in the Declaration would not be admissible as evidence at
14 trial. To the extent Plaintiff attempts to question Roesner's
15 competence to testify, Plaintiff has failed to allege any facts
16 that would call into question Roesner's competence at the time that
17 Roesner's Declaration was made. Alex Kessler's Declaration points
18 to statements made by Roesner, in a "Set Aside Motion" in state
19 court, detailing his mental health struggles. However, even if
20 these statements were substantively relevant, they were made more
21 than six months prior to the date of Roesner's Declaration, and
22 they do not call into question Roesner's competence at the time of
23 the Declaration.

24 Third, Plaintiff claims Roesner's Declaration should not be
25 considered due to concerns of credibility based on two events that
26 happened at Roesner's deposition. First, Plaintiff asserts that,
27 before the deposition, Roesner yelled at his wife to stop talking
28 to Plaintiff and Plaintiff's counsel. Second, he asserts that

1 Roesner refused to proceed with the deposition, because Roesner was
2 uncomfortable proceeding without his attorney in the presence of
3 Plaintiff and Plaintiff's counsel.

4 At summary judgment, a "party may object that the material
5 cited to support or dispute a fact cannot be presented in a form
6 that would be admissible in evidence." Fed. R. Civ. P. 56(c) (2).
7 But, at this stage, the court is not concerned with the form of the
8 evidence, but whether the contents of the evidence could be
9 admitted at trial. *Faulks v. Wells Fargo & Co.*, 231 F. Supp. 3d
10 387, 396 (N.D. Cal. 2017) (citing *Fraser v. Goodale*, 342 F.3d 1032,
11 1036 (9th Cir. 2003)). Further, the Court does not make
12 credibility determinations at summary judgment, but draws all
13 reasonable inferences and views the evidence in the non-movant's
14 favor. *Anderson*, 477 U.S. at 255.

15 The Court finds the contents of Roesner's Declaration as
16 likely to be admissible at trial through Roesner's testimony, and
17 there has been no indication that such testimony would not be
18 available. To the extent that there are credibility concerns in
19 regard to Roesner's Declaration, the Court is to draw all
20 reasonable inferences and view the evidence in Plaintiff's favor.
21 Further, a finding of summary judgment requires there to be no
22 dispute of material fact. For these reasons, the Court does not
23 find concerns of credibility to warrant striking Roesner's
24 Declaration.

25 Finally, the claim that Plaintiff did not have the opportunity
26 to cross-examine Roesner, due to Roesner withdrawing from his
27 deposition and discovery closing, is unavailing. Plaintiff had
28 more than a year to conduct discovery and to depose Roesner in this

1 action. Further, on a motion for summary judgment, the movant can
2 support their case with declarations, if the facts set out would be
3 admissible in evidence. Fed. R. Civ. P. 56(c) (4). As previously
4 stated, the Court sees no basis for finding that the facts set out
5 in Roesner's Declaration would be inadmissible at trial.

6 For all of these reasons, Plaintiff's Objection and Motion to
7 Strike are DENIED.

8 **V. THE STANDARD FOR EXCEPTING A DEBT FROM DISCHARGE UNDER 11**
9 **U.S.C. § 523(a)(2)**

10 All three of the claims for relief at issue in Defendant's
11 MPSJ are governed by 11 U.S.C. § 523(a)(2). Section 523(a)(2)
12 provides, as relevant here, that a discharge does not include any
13 debt for an extension, renewal, or refinancing of credit, to the
14 extent obtained by:

- 15 (A) false pretenses, a false representation, or actual
16 fraud, other than a statement respecting the debtor's or
an insider's financial condition;
17 (B) use of a statement in writing-
18 (i) that is materially false;
19 (ii) respecting the debtor's or an insider's
financial condition;
20 (iii) on which the creditor to whom the debtor is
liable for such money, property, services, or credit
reasonably relied; and
21 (iv) that the debtor caused to be made or published
with intent to deceive.

22 11 U.S.C. § 523(a)(2)(A)-(B).

23 To prevail on a § 523(a)(2)(A) claim, a creditor must prove:

- 24 (1) a misrepresentation, fraudulent omission or deceptive
25 conduct by the debtor; (2) knowledge of the falsity or
deceptiveness of the statement or conduct; (3) an intent
26 to deceive; (4) justifiable reliance by the creditor on
the debtor's statement or conduct; and (5) damage to the
27 creditor proximately caused by its reliance on the
debtor's statement or conduct.

28

1 *Jadallah v. Carroll (In re Carroll)*, 549 B.R. 375, 381 (Bankr. N.D.
2 Cal. 2016) (citing *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240,
3 1246, 1246 n.4 (9th Cir. 2001)). A claim under § 523(a)(2)(B)
4 requires essentially the same showing, except reasonable reliance
5 is required of the creditor. See *Gertsch v. Johnson & Johnson,*
6 *Fin. Corp. (In re Gertsch)*, 237 B.R. 160 (B.A.P. 9th Cir. 1999)
7 (citing *Candland v. Ins. Co. Am. (In re Candland)*, 90 F.3d 1466,
8 1469 (9th Cir. 1996)).

9 Whether reliance is justifiable requires consideration of the
10 "qualities and characteristics" of the plaintiff. *Citibank (S.D.),*
11 *N.A. v. Eashai (In re Eashai)*, 83 F.3d 1082 (9th Cir. 1996)
12 (quoting *Field v. Mans*, 516 U.S. 59, 71 (1995)). A plaintiff is
13 justified in relying on a representation even though the falsity of
14 the representation may have been discovered upon investigation.
15 *Id.* (quoting *Field*, 516 U.S. at 70). But a plaintiff cannot "close
16 his eyes to avoid discovery of the truth." *Id.* (quoting *Romesh*
17 *Japra, M.D., F.A.C.C., Inc. v. Apte (In re Apte)*, 180 B.R. 223, 229
18 (B.A.P. 9th Cir. 1995)).

19 On the other hand, reasonable reliance, under § 523(a)(2)(B),
20 is an objective standard to be reviewed under the totality of the
21 circumstances. *Maxwell v. Oregon (In re Maxwell)*, 600 B.R. 62, 70
22 (B.A.P. 9th Cir. 2019) (citing *Candland*, 90 F.3d at 1471; *Gertsch*,
23 327 B.R. at 170).

24 **A. Plaintiff Cannot Establish That He Was Reasonable in**
25 **Relying on Defendant's Statements Relating to Her Income.**

26 The Third Claim for Relief in Plaintiff's Complaint alleges
27 that Defendant, or others acting on her behalf (Roesner acting as
28 loan broker) made numerous false statements orally and in writing

1 concerning the amount of Defendant's monthly income. Am. Compl. 5-
2 6, ECF No. 8. Plaintiff further alleges that he relied on these
3 statements in deciding to make the Loan to Defendant. *Id.*

4 It is unclear from the Complaint or from any other allegation
5 set forth in any pleading relevant to this MPSJ that Defendant
6 personally had any contact with Plaintiff in which she would have
7 made, or is specifically alleged to have made, an oral statement
8 concerning her income. And while there are allegations in the
9 Complaint that might support an inference that Roesner communicated
10 information orally concerning Defendant's employment and income,
11 such allegations are also too imprecise to be of any help in this
12 context.

13 Nor is it clear that any such oral statements would have any
14 legal significance, since allegedly false statements about one's
15 income are statements about financial condition, and must be in
16 writing to be actionable. 11 U.S.C. § 523(a)(2)(B); *Lamar, Archer*
17 & *Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758-59 (2018).
18 Plaintiff essentially conceded this point in his Motion for Summary
19 Judgment ("Plaintiff's MSJ"). See Pl.'s Mot. Summ. J. 7, ECF No.
20 11. And, for reasons that will be apparent, the Court's analysis
21 of this issue is informed by the parties' arguments made in
22 connection with the Plaintiff's MSJ, and in the Court's Memorandum
23 denying the motion. See *id.*; Mem. Decision Mot. Summ. J., ECF No.
24 55.

25 The focus of this inquiry has been on the Loan Application and
26 the Borrower's Certification which Defendant provided to Plaintiff
27 prior to Plaintiff approving the Loan. Although the Loan
28 Application contains numerous items of information that might be

1 pertinent to Defendant's ability to service the Loan, Plaintiff's
2 MSJ focused on statements that Defendant's gross income was at
3 least \$21,375 as false and made with intent to deceive.

4 There was significant argument between the parties in
5 connection with the Plaintiff's MSJ concerning whether the
6 statements by the Defendant, who is self-employed, about her income
7 were false, or made with intent to deceive. But the Court denied
8 the Plaintiff's MSJ on the grounds that no one could have reviewed
9 the Loan Application and concluded, based on the information
10 provided therein, even assuming that the \$21,375 amount of income
11 was accurate, that Defendant had the financial ability to make the
12 almost \$17,000 monthly payments required under the Loan. The Court
13 thus concluded that Plaintiff had failed to demonstrate that there
14 was no genuine issue of disputed material fact concerning his
15 reasonable reliance on the statements about income, and denied the
16 Motion on that ground. Mem. Decision Mot. Summ. J. 22-23, ECF No.
17 55. Defendant had not countermoved for summary judgment on that
18 ground, and the Court was therefore unable to grant summary
19 judgment in favor of Defendant. *Id.*

20 Picking up on this cue, Defendant seeks summary judgment on
21 the Third Claim for Relief on the basis that Plaintiff cannot
22 demonstrate that he could reasonably have relied on Defendant's
23 statement of her income as set forth on the Loan Application. In
24 support of this argument, Defendant points out that even if one
25 accepted as true the statement that Defendant's gross (and regular)
26 monthly income was \$21,375, plausible and reasonable expense items
27 that were also clearly disclosed on the Loan Application, including
28 for property taxes and insurance on the Property, car payments, and

1 student loan payments, totaled \$8,316.07, leaving Defendant with a
2 post-expenses, pre-tax per month income of just over \$13,000. See
3 Decl. Geralynne Longmire Supp. Mot. Summ. J. Ex. D-1, at 51, ECF
4 No. 122. This amount is significantly less than the monthly
5 payments under the Loan, even before accounting for normal costs of
6 living such as food, transportation, etc.

7 Defendant also points out that Plaintiff has conceded that he
8 did not even attempt to verify the income statement on the Loan
9 Application, and argues that such behavior is thoroughly
10 inconsistent with the sort of care and concern that would be
11 expected from a reasonably prudent lender. Decl. Hugo Torbet Supp.
12 Mot. Summ. J. Ex. B-4, at 3, ECF No. 123. Defendant asserts that
13 in light of these facts, Plaintiff cannot show that he reasonably
14 relied on her statements of income.

15 Plaintiff responds that summary judgment is not appropriate on
16 this point, because the case law states that whether a party's
17 reliance was reasonable is a question of fact that must be
18 determined in light of the totality of the circumstances. Pl.'s
19 Opp'n Mot. Summ. J. 10, ECF No. 153. Fair enough. But the
20 question is whether, under the totality of the circumstances as we
21 review them here, there is any genuine issue of disputed material
22 fact on this point. The Court does not believe there is.

23 Responding to Plaintiff's argument that Defendant has not
24 provided evidence of what a reasonably prudent lender would have
25 done under the circumstances of this Loan Application, the precise
26 question is, what would a reasonably prudent lender, who alleged
27 that he relied on the borrower's income and ability to make
28 payments in making the Loan, do to verify income? While the Court

1 concedes that an acceptable standard of care for a reasonably
2 prudent lender relying on the borrower's statement of income might
3 allow for some nuance in approaches, or some slightly different
4 levels of care and concern that might be measured at a trial, the
5 Court concludes that doing exactly nothing to verify income in
6 connection with a loan that called for payments of almost \$17,000
7 per month does not fit anywhere on the "reasonably prudent lender"
8 scale.

9 Nor is the Court persuaded that the allegedly short-term
10 nature of the Loan excuses the absence of any sort of conduct by
11 Plaintiff that would demonstrate reliance, particularly where such
12 behavior would have included the not at all onerous step of
13 performing a simple arithmetic calculation to confirm the obvious
14 fact that Defendant could not possibly have made the payments
15 required under the Loan. It may well be that Plaintiff and
16 Defendant each expected, at least ostensibly, for this to be an
17 extremely short-term Loan, and if Plaintiff were actually relying
18 on that proposition to explain his lack of concern about
19 Defendant's income, he might have devoted more than the ten lines
20 of citation-free argument contained in his Opposition to bolster
21 the point, given the obligation of the party opposing summary
22 judgment to present facts showing the existence of a genuine
23 dispute, as opposed to what might be asserted at trial.

24 In any event, it doesn't matter in this instance. Even
25 accepting the premise that the totality of the circumstances
26 present here would include consideration of the extreme short-term
27 nature of the Loan, that simply proves the same point--for exactly
28 that reason, it is clear that Plaintiff did NOT rely on statements

1 about Defendant's income, or her resulting ability actually to pay
2 the very large monthly payments, in deciding to make this Loan.

3 Summary judgment in favor of Defendant is appropriate with
4 respect to the Third Claim for Relief.

5 **B. Plaintiff Cannot Establish That Defendant Made False**
6 **Representations Regarding Value of the Property, or That,**
7 **Even If She Had Made False Statements, That Plaintiff**
8 **Reasonably Relied on Them.**

9 The Second Claim for Relief in Plaintiff's Complaint alleges
10 that Defendant made numerous false statements orally and in writing
11 concerning the value of the Property. Plaintiff further alleges
12 that he relied on these statements in deciding to make the Loan to
13 Defendant. As explained in section IV.A., the Complaint does not
14 allege that Defendant made any specific oral statements to
15 Plaintiff concerning the value of the Property; there are no known
16 conversations between Defendant and Plaintiff prior to the Loan
17 being made. But, also as addressed in section IV.A., the presence
18 of specific oral statements would not benefit Plaintiff--false
19 statements about the value of an asset are statements representing
20 financial condition, and must be in writing to be actionable. And
21 though the Complaint is imprecise, that imprecision does not
22 prevent the Court from deciding Defendant's MPSJ based on the
23 pleadings, unless it were shown in an opposition to this motion
24 that the proof would be different at trial. Plaintiff has made no
such showing.

25 Although the Court does not find any particular oral
26 statements made by Defendant, or on her behalf, regarding the value
27 of the Property, and Plaintiff's Complaint does not specifically
28 identify written statements either, the parties' subsequent

1 pleadings have focused in on the Appraisal provided by Defendant,
2 valuing the Property at \$2,520,000 as of May 11, 2015, and
3 Defendant's \$2,500,000 valuation submitted on the Loan Application.
4 Decl. Longmire Exs. A, D-1, ECF No. 122.

5 Defendant's MPSJ asserts that the undisputed facts show that
6 Defendant did not make false statements in regard to the value of
7 the Property, and that, even if she did, Plaintiff's reliance on
8 her statements of value was unreasonable.

9 1. **The Undisputed Material Facts Show That Defendant's**
10 **Statements Regarding Value Were Not Actionable**
Misrepresentations.

11 Statements concerning the value of property are generally
12 deemed to be expressions of personal opinion and not actionable
13 representations of fact upon which the other party can rely.
14 *Assilzadeh v. California Fed. Bank*, 82 Cal. App. 4th 399, 411-12
15 (2000) (citing Miller & Starr, Cal. Real Estate (2d ed. 1989)).
16 Defendant argues that the value of \$2,500,000 that she attributed
17 to the Property on the Loan Application was based on her opinion of
18 what it was worth, in reliance on the value set forth in the
19 Appraisal. Decl. Longmire Ex. A, ECF No. 122.

20 Plaintiff's argument that Defendant made fraudulent statements
21 about the value of the Property is based primarily on the
22 difference between the value that was obtained for the Property at
23 the foreclosure sale that Plaintiff conducted in February 2018 and
24 the value that the Appraisal ascribed to the Property in May 2015.
25 Plaintiff contends that the difference in these values must
26 demonstrate that the Appraisal was fraudulent. But the foreclosure
27 sale took place almost three years after the date of the Appraisal
28 and almost two years after Defendant signed the Loan Application,

1 and the value obtained at a foreclosure sale of real property may
2 well be less than would be obtained under a less distressed sales
3 environment.

4 Simply put, there is no credible allegation, or even hint,
5 that the Appraisal upon which Defendant relied was fabricated or
6 fraudulent at the time it was made. And if the Appraisal was
7 arguably stale, due to being prepared roughly ten months in advance
8 of the Loan, that fact was hardly unknown to Plaintiff. Therefore,
9 the Appraisal, by itself, does not constitute a false statement.
10 And Defendant appears to have relied upon the Appraisal in entering
11 the same \$2,500,000 value on the Loan Application; accordingly, the
12 Court cannot conclude that Defendant's statement of value in the
13 Loan Application, without more, was false either.

14 However, Plaintiff contends that Defendant knew the Property
15 was not worth \$2,500,000, because two separate real estate
16 professionals had told her that, in their opinions, the Property
17 was worth considerably less. The first such instance involved a
18 real estate broker that Roesner had walk the Property ("Roesner's
19 Broker") weeks before the closing of the Loan. Afterward, as
20 Defendant testified at her deposition, Roesner's Broker informed
21 Defendant orally that the Property was worth between \$2,300,000 and
22 \$2,400,000, but he did not elaborate on the basis for that opinion.
23 Decl. Judd Kessler Opp'n Mot. Summ. J. Ex. 1, at 78, ECF No. 153.
24 There is no suggestion in the record that Roesner's Broker ever
25 prepared a formal appraisal or performed a more in-depth analysis
26 of the Property.

27 The second real estate professional to have opined was
28 Marques Buck, a real estate salesperson that Defendant had

1 previously employed. Decl. Judd Kessler Opp'n Mot. Summ. J. Ex. 1,
2 at 69-70, Ex. 2, at 14, ECF No. 153. In a deposition, Mr. Buck
3 testified to telling Defendant, in November 2015, that \$2,500,000
4 was "probably next to impossible" to get and that the end of the
5 year was not a good time to sell. Decl. Judd Kessler Opp'n Mot.
6 Summ. J. Ex. 2, at 15. Mr. Buck suggested Defendant would have
7 better luck in the spring. *Id.* at 16. But in late February,
8 Mr. Buck testified that he told Defendant, again, that he didn't
9 think she could get close to \$2,500,000, and on that basis he never
10 listed the Property, despite entering a listing agreement with
11 Defendant. *Id.* at 21-22. Mr. Buck believed that Defendant would
12 need to invest \$200,000 to \$300,000, or more, to be able to sell
13 the Property for \$2,500,000. *Id.* at 17-18. Mr. Buck testified
14 that the Appraisal Defendant had obtained was based on "comps in a
15 similar area but that were fully done. I mean, had amazing pools,
16 back yards [sic], everything." *Id.* at 17. In comparison, Mr. Buck
17 noted that Defendant had "zero backyard" and "a little tiny patio,"
18 but if Defendant got a loan to fix up her yard she might be able to
19 get close to \$2,500,000. *Id.* at 17-18. Although Mr. Buck
20 testified to discussing a strategy for improving the backyard, he
21 does not testify as to the details of that discussion. *Id.* at 23-
22 24.

23 Defendant's testimony at her deposition confirmed that
24 Mr. Buck did tell her that \$2,500,000 was high, because the
25 Property did not have a pool and needed various upgrades. Decl.
26 Judd Kessler Opp'n Mot. Summ. J. Ex. 1, at 69-71. Defendant
27 further testified that Mr. Buck told her the Property was worth
28 between \$2,000,000 and \$2,200,000. *Id.* at 71, 78. The Court will

note that there is a dispute between the parties as to when
Mr. Buck made some of these statements to Defendant. Mr. Buck's
testimony is that he told Defendant that the Property was not worth
\$2,500,000 in the months leading up to the Loan, while Defendant
appears to testify that Mr. Buck told her that valuation was high,
but he did not specifically tell her the value or about the
improvements until after the Loan closed. Decl. Judd Kessler Opp'n
Mot. Summ. J. Ex. 1, at 71, Ex. 2, at 23-24. As will be explained
infra, when the statements were made to Defendant will not impact
the result here.

11 In light of these arguments, the Court finds that the proper
12 framing here is not whether Defendant's statements of value were,
13 by themselves, false, but, rather, whether Defendant's failure to
14 disclose the real estate professionals' statements was an
15 actionable misrepresentation.

a. The Real Estate Professionals' Statements Regarding Value Did Not Contain Material Facts, So Defendant Did Not Have a Duty to Disclose Them.

19 "A debtor's failure to disclose material facts is
20 actionable . . . if he or she was under a duty to disclose and the
21 omission was motivated by an intent to deceive." *In re Carroll*,
22 549 B.R. at 381 (citing *Harmon*, 250 F.3d at 1246 n.4). California
23 courts have generally provided four circumstances in which a duty
24 to disclose may arise:

25 (1) when the defendant is the plaintiff's fiduciary; (2)
when the defendant has exclusive knowledge of material
26 facts not known or reasonably accessible to the
plaintiff; (3) when the defendant actively conceals a
27 material fact from the plaintiff; and (4) when the
defendant makes partial representations that are

1 misleading because some other material fact has not been
2 disclosed.

3 *Rasmussen v. Apple, Inc.*, 27 F. Supp. 3d 1027, 1033 (N.D. Cal.
4 2014) (citation omitted); see, e.g., *LiMandri v. Judkins*, 52 Cal.
5 App. 4th 326, 336 (1997).

6 The only relevant legal relationship between these parties is
7 as borrower and lender in a loan transaction. Neither party has
8 alleged, and the Court cannot imagine, any basis under which the
9 parties' relationship would have implicated a fiduciary duty owed
10 by Defendant to Plaintiff. Therefore, the first circumstance in
11 which a duty to disclose may arise is not relevant here.

12 Turning to the other three circumstances for finding a duty to
13 disclose, the central issue in all three is whether a material fact
14 was withheld from Plaintiff. Accordingly, the Court must determine
15 whether the statements by either Roesner's Broker or Mr. Buck
16 provided Defendant with a material fact, or facts, that would have
17 required Defendant's disclosure.

18 As to Roesner's Broker, the only fact that has been alleged,
19 and which is undisputed, is that upon walking the Property the
20 broker told Defendant that the Property was worth between
21 \$2,300,000 and \$2,400,000. Decl. Judd Kessler Opp'n Mot. Summ. J.
22 Ex. 1, at 78, ECF No. 153. Plaintiff does not allege, nor do the
23 facts support, that Roesner's Broker provided an explanation or
24 factual basis for his valuation. As with Defendant's statement of
25 value, Roesner's Broker's statement of value would appear to be an
26 opinion simply based upon his tour of the Property. There is no
27 basis for finding that his valuation contained a material fact that
28 Defendant would need to disclose, and, as an opinion, his oral

1 valuation does not foreclose Defendant from having a different
2 opinion as to the value.

3 Turning to Mr. Buck's statements, he also provided Defendant
4 with an opinion as to the value of the Property. Mr. Buck's
5 statements went a step further than Roesner's Broker's in that they
6 included some explanation for the basis of his valuation. Mr. Buck
7 told Defendant that the Property was worth \$2,000,000 to \$2,200,000
8 and that the Property would need a pool and other improvements to
9 increase value to \$2,500,000. Decl. Judd Kessler Opp'n Mot. Summ.
10 J., Ex. 1, at 71.

11 The Court does not find any claims in the record that the
12 condition and/or amenities of the Property were misrepresented or
13 undisclosed to Plaintiff. The details raised by Mr. Buck were not
14 exclusively known by Defendant, and there is no basis for believing
15 that Plaintiff did not have reasonable access to them. There have
16 been no claims that Defendant misrepresented the Property
17 whatsoever. So, while Mr. Buck's statements provided a basis for
18 his opinion as to the value of the Property, they did not raise any
19 facts to Defendant's attention that would need to be disclosed,
20 like cracks in the foundation or water damage in the walls might
21 require. Instead, Mr. Buck explained to Defendant the basis for
22 his opinion of the value of the Property by referring to attributes
23 of the Property that were publicly available through a simple
24 internet search. Mr. Buck's reference to the features of the
25 Property does not transform his opinion of value into a fact.

26 Finally, there has been no showing that the Property's value
27 suffered due to a material fact that Defendant failed to disclose.
28 There has also been no showing that would invalidate Defendant's

1 opinion as to the value of the Property. Although Mr. Buck was
2 more definitive in his rejection of the \$2,500,000 value, Roesner's
3 Broker's valuation was not far off from the Appraisal that
4 Defendant relied upon. At the end of the day both of these
5 valuations were the subjective opinions of Mr. Buck and Roesner's
6 Broker, as demonstrated by the disagreement between them. There
7 has been no showing that the Property's value was less than
8 Defendant asserted due to a material fact that was not disclosed to
9 Plaintiff. Accordingly, there has been no showing that Defendant's
10 assertion was either false or invalid due to a duty to make a
11 separate disclosure. And, the mere fact that the Property sold for
12 less than the Appraisal, some three years later, does not establish
13 a causal link to fraud.

14 For all of these reasons, the Court finds that Defendant's
15 statement of value was a non-actionable opinion and that she did
16 not have a duty to disclose the opinions of the real estate
17 professionals, as to value, to Plaintiff.

18 **2. Even If There Was a Basis for Finding Defendant Made**
19 **a Fraudulent Misrepresentation, the Court Would**
 Likely Find Plaintiff's Reliance to Be Unreasonable.

20 Defendant also argues that Plaintiff's reliance on her
21 statements of value was not appropriate. Although the Court finds
22 this issue to be moot, in light of its findings in section
23 V.B.1.a., the Court will briefly explain why it would likely find
24 Plaintiff's reliance to be unreasonable were it to rule on this
25 point.

26 Although Defendant's MPSJ applies the "justifiable reliance"
27 standard to this issue, which is a less demanding standard for the
28 Plaintiff to demonstrate, the Supreme Court has made clear that "a

1 statement about a single asset can be a 'statement respecting the
2 debtor's financial condition,'" requiring application of the
3 reasonable reliance standard under § 523(a)(2)(B). *Lamar*, 138 S.
4 Ct. at 1764. Defendant's statements of value are about her asset,
5 the Property, and therefore the reasonable reliance standard would
6 apply here.

7 Plaintiff is an attorney and a very experienced real estate
8 lender that was asked to make a high-interest, short-term bridge
9 loan to Defendant to replace another obligation that had matured.
10 See Decl. Judd Kessler Supp. Mot. Summ. J. 1-2, ECF No. 11-3;
11 Decl. Hugo Torbet Ex. I, ECF No. 123; Decl. Roesner Ex. R-2, R-4,
12 D-1, ECF No. 124. In applying for the Loan with Plaintiff,
13 Defendant provided Plaintiff with an Appraisal valuing the Property
14 at \$2,500,000, as of May 11, 2015. Decl. Longmire Ex. A, ECF No.
15 122. Defendant also entered this value on the Loan Application.
16 Decl. Longmire Ex. D-1, ECF No. 122.

17 Plaintiff was aware that the Appraisal Defendant provided was
18 almost a year old, and that the value Defendant provided on the
19 Loan Application was roughly the same as the Appraisal. A
20 reasonably prudent lender, contemplating making a loan of nearly
21 \$2,000,000, would likely perform their own investigation, in light
22 of the fact that the only basis for valuation is a ten-month-old
23 Appraisal. This is especially true where Plaintiff claimed to only
24 make loans that were 80 percent of the value of the property, and
25 where the borrower was in a tight financial position and needed the
26 money to keep their property. Am. Compl. 2, ECF No. 8; Decl.
27 Roesner Ex. R-2. Accordingly, the Court would likely find that
28

1 Plaintiff's reliance on Defendant's \$2,500,000 valuation of the
2 property was unreasonable.

3 For all of these reasons, the Court finds that summary
4 judgment in favor of Defendant is appropriate on Plaintiff's Second
5 Claim for Relief, as Defendant's statements of value were her
6 opinion and not fraudulent misrepresentations. Accordingly, the
7 Court does not decide whether Plaintiff's reliance on the
8 statements was reasonable, as that issue is moot.

9 **C. Plaintiff's First Claim for Relief That Defendant Made a**
10 **False Representation Regarding Her Place of Residence**

11 **1. Plaintiff Cannot Show That He Was Justified in**
12 **Relying on Defendant's Representation Regarding**
13 **Her Residence.**

14 The Plaintiff's First Claim for Relief asserts that Defendant,
15 or those acting on her behalf (again, assumedly the loan broker
16 Roesner) made, orally and in writing, several allegedly false
17 statements concerning whether Defendant occupied or intended in the
18 future to occupy the Property as her residence, as well as the
19 purpose of the Loan and her intended disposition of the Property.

20 Plaintiff also sought summary judgment on this issue, arguing
21 that each of the elements of a claim under § 523(a)(2)(A) had been
22 demonstrated through the exhibits offered in support of the Motion,
23 i.e., the Loan Application, the Borrower's Certification &
24 Authorization, the Occupancy Statement and the Business Purpose
25 Statement. The Defendant disputed all of the relevant allegations.
26

27 ² The Court also noted that discovery was far from complete (the Motion was
28 brought relatively soon after filing the Complaint) and that the Court's
observations concerning a number of the elements of a § 523(a) claim were, in
the context of a motion for summary judgment that was being denied, preliminary

1 had made false statements about her residence in the Loan
2 Documents, the Court declined to grant the Motion on the basis that
3 the Court believed that there was a genuine issue of disputed fact
4 concerning whether Defendant intended to deceive Plaintiff on these
5 issues, based on the Plaintiff's declaration testimony that she
6 believed that Roesner and Plaintiff each actually understood that
7 the Property was her residence.

8 Defendant now seeks summary judgment on the First Claim for
9 Relief, claiming that Plaintiff cannot establish that he
10 justifiably relied on Defendant's statements that she did not
11 reside at the Property. Indeed, Defendant's counsel claims that
12 the record demonstrates "with uncontroverted testimony which is
13 corroborated with uncontroverted documentation . . . that the
14 Plaintiff knew that the property was her primary dwelling when he
15 was negotiating the loan." Def.'s Reply 7, ECF No. 155.

16 Put simply, proving reliance for purposes of § 523(a)(2)(A)
17 requires establishing two elements: (a) that Defendant made a
18 false statement with intent to deceive on which Plaintiff actually
19 relied, and (b) that Plaintiff's reliance was, in the case of an
20 allegedly false statement under § 523(a)(2)(A), justifiable.³ See
21 *In re Carroll*, 549 B.R. at 381 (citation omitted). And while the
22 standard for justifiable reliance is more subjective than the
23 "reasonable" standard under § 523(a)(2)(B), Defendant correctly
24 states that this standard does not write a concept of

25 and not in any sense final. Mem. Decision Mot. Summ. J. 2, ECF No. 55.
26

27 ³ It appears that the parties agree that any statements about Defendant's
28 residence at the Property would not be statements about her financial condition
that would implicate § 523(a)(2)(B). Hence, the standard that must be
demonstrated is justifiable, not reasonable, reliance.

1 "reasonableness" out of the statute. See *Field v. Mans*, 516, U.S.
2 at 75. Stated differently, while in many cases a plaintiff may not
3 have been required to undertake an inquiry independently to verify
4 the statements on which he relies, the plaintiff is not permitted
5 to ignore other statements or evidence that would obviously call
6 into question the veracity or the completeness of the statement on
7 which the plaintiff claims to have relied. *Id.* at 75-76. Indeed,
8 one may not be a "naif" for these purposes. *Id.* at 76. And in
9 judging this factor, the Court may weigh particular pertinent
10 facts, including the sophistication and expertise of the parties
11 and the materiality of the statement. See *id.* at 75-76.

12 So it is entirely appropriate to view the written statements
13 Defendant made in the Loan Documents, as Plaintiff asks the Court
14 to do, to assess what statements were made, and their falsity and
15 materiality. And it is equally valid for Defendant to ask that the
16 Court review other contemporaneous statements offered by the
17 parties during the Loan negotiation and closing to assess whether
18 Plaintiff actually relied on the statements in the Loan Documents,
19 and whether, in light of these other communications, his reliance
20 was justifiable.

21 As background, Plaintiff alleges that he would not have made
22 the Loan had he believed that Plaintiff was occupying the Property,
23 or would occupy it during the time the Loan was outstanding.
24 Plaintiff's reluctance was based on his concerns that (a) federal
25 law imposed significant additional disclosure requirements on
26 lenders making loans to consumers for personal purposes (i.e.,
27 Truth in Lending Act, see section VI. infra), and (b) state law
28 provided additional protections to consumer borrowers who pledged

1 their homes as security for loans (i.e., California's anti-
2 deficiency laws), and to individuals residing in real property
3 (i.e., California unlawful detainer laws). Citing these concerns,
4 Plaintiff has consistently averred that he would not have made the
5 Loan absent assurances that the Property was not Defendant's
6 primary residence, that he relied on Defendant's alleged
7 misstatements about these issues and that these alleged
8 misstatements were a material inducement to make him make the
9 Loan.⁴

10 Plaintiff relies on the written statements in the Loan
11 Documents, which he alleges contain numerous false statements of
12 fact which the Court will summarize here for convenience, and will
13 offer a reference to potentially countervailing or inconsistent
14 statements, or other helpful context:

15 • The Loan Application, signed by Defendant on March 12,
16 2016, states that (a) the Property is vacant, (b)
17 Defendant currently resides at 110 Kingswood Circle in
18 Danville (her mother's residence) which she rents, and
19 (c) Defendant has not resided at the Property for two
20 years. Decl. Judd Kessler Supp. Mot. Summ. J. Ex. 1, ECF
21 No. 11-3. These statements appear to be false.

22 Defendant asserts that she did not provide the
23 information contained in the Loan Application, but that
24 it was filled out when she signed it at the escrow

25
26 _____
27 ⁴ The Court notes that even if it ultimately concludes that Defendant made
28 false statements about her residency, and they were actually material to
Plaintiff's decision to make the Loan, there is still an open question whether
Defendant's allegedly false statements concerning her residency actually caused
any damages to Plaintiff recoverable under a fraud theory.

1 office. Decl. Longmire 2:20-23, ECF No. 122. The source
2 of the information contained in statements "a" and "c" is
3 unknown, but it appears directly to contradict several
4 other statements made by Roesner and Defendant to
5 Plaintiff, detailed below. The Loan Application also
6 states that the means of repayment of the Loan will be
7 "Resale." Decl. Judd Kessler Supp. Mot. Summ. J. Ex. 1.

8 • The Borrower's Certification & Authorization, also signed
9 by Defendant on March 12, states that the information
10 provided in the Loan Application is true and correct and
11 authorizes Plaintiff to verify the information, and to
12 share it with others participating in the Loan. Decl.
13 Judd Kessler Supp. Mot. Summ. J. Ex. 2, ECF No. 11-3. As
14 with the Loan Application, this document also appears
15 inconsistent with other statements and communications
16 made with Plaintiff. It would appear to the Court that
17 Plaintiff never actually verified information concerning
18 Defendant's residency at the Property.

19 • The "Declaration of Occupancy," also signed by Defendant
20 on March 12, states that Defendant acknowledges the
21 importance of Lender understanding whether she occupies
22 the Property that will secure the Loan as her residence,
23 declares that she resides at the Kingswood Circle
24 address, that the Property is not her personal residence,
25 and that she has no intention of "ever making" the
26 Property her personal residence. *Id.* at Ex. 3. Again,
27 these statements were all apparently contradicted by
28

1 information imparted to Plaintiff during the Loan
2 negotiation.

- 3 • The "Occupancy Statement," also signed by Defendant on
4 March 12, states under the heading "Occupancy Status"
5 that "The Property is/will be Investment Property," and
6 that it will not be occupied or claimed by Defendant as
7 any sort of residence and that Defendant resides at a
8 different property. See *id.* at Ex. 4, ECF No. 11-4.
9 Again, these statements were all apparently contradicted
10 by information imparted to Plaintiff during the Loan
11 negotiation.
- 12 • The "Business Purpose Statement," also signed by
13 Defendant on March 12, states that Defendant is aware of
14 the importance of Lender understanding the purpose of the
15 Loan and that the purpose of the Loan was "Business" and
16 not consumer. *Id.* at Ex. 5, ECF No. 11-4.

17 Defendant counters with a number of statements and
18 communications between and among Roesner and Defendant⁵ prior to
19 the closing of the Loan that Defendant asserts establish that
20 Plaintiff was aware that the Property was Defendant's residence
21 during the period that Plaintiff and Defendant were negotiating the
22 Loan. The Court summarizes these statements below, and provides
23 additional information from the record:

- 24 • On February 27, 2016 Roesner sent an email to Plaintiff,
25 describing Defendant's current need for a loan, and

27 ⁵ And, again, it does not appear that there were any direct contacts, oral
28 or in writing, between Plaintiff and Defendant, prior to the closing of the
Loan.

1 relevant circumstances, including that with her children
2 out of the house, Defendant no longer needed such a large
3 residence, "so she is making a permanent move into her
4 mother's house **presently** to prepare the home for an
5 immediate sale." Decl. Roesner Ex. R-2, ECF No. 124
6 (emphasis added). Roesner went on to state, "I have
7 asked her to list the property before we close her loan
8 so we know it's going to be sold." *Id.* It is not clear
9 from the record the source of the information provided by
10 Roesner regarding Defendant's plans and intentions
11 concerning the Property, or even if she was aware at the
12 time that Roesner was making these representations to
13 potential lenders. Defendant has not disavowed any of
14 these statements or claimed that Roesner was not
15 authorized to make them on her behalf.

- 16 • On February 28, Roesner sent a follow-up email stating:

17 My client told me she really just wants the
18 house sold as it's just too much house for one
19 person and although she knows she could get
some nice rent . . . [she] would prefer to just
20 pocket her equity. . . . She is happy at this
point living with her mom and getting the house
listed and sold.

21 *Id.* at Ex. R-3. Similarly, as noted above, it is not
22 clear the source of the information provided by Roesner,
23 and Defendant has not confirmed or denied the truth or
24 accuracy of these statements.

- 25 • On March 8, Roesner wrote Defendant an email stating:

26 I need to make sure that my investor
27 is protected legally regarding you
vacating the property. Will you
please send me a letter stating your
28 intentions about selling and moving

1 right away? I realize I have asked
2 for it before Please send me
3 the letter, the listing agreement,
and give me an update on the
appraisal

4 *Id.* at Ex. R-5.

- 5 • On the same day, Defendant replied, in apparent
6 frustration:

7 You are protecting your investor / client
8 however, [i]t is the same scenario with
9 all hard money lenders....[sic] move out
until the loan closes. You know the home
10 is my residence, and so does your
investor. Now almost a month into the
11 loan process, and right before he is going
to fund he wants me to write a letter that
I will move out until the loan closes. He
12 knows at this point I have no other
option, but to do what he wants, or I will
13 lose my home. I will write the letter,
and do what he has asked so I can save my
14 house.

15 *Id.* at Ex. R-6. It is not apparent that Plaintiff
16 reviewed this email prior to the closing of the Loan.

- 17 • And later on that same day, March 8, 2016, Defendant
18 wrote a letter:

19 March 8, 2016 [the figure "6" is slightly
20 smudged on the exhibit proffered]

21 Attention: Russell Roesner, Equity Coalition

22 To whom it may concern,

23 I write this letter in regards to my home at
24 215 El Pinto Danville, Ca 94526. I will be
refinancing the home as a bridge loan to sell
25 the house. I have listed the house with
Marques Buck from Better Homes Realty in
Danville. My intention is to move out of the
26 home to stage it for the highest sale possible.

27 In the interim I plan to live with my mother in
her Danville home at 110 Kingswood Circle.
28 This will allow for my home to stay in tip top

1 condition for a better market value. If there
2 are any questions please feel free to call me
at your convenience.

3 Best regards,

4 [signed by Defendant]

5 *Id.* at Ex. R-7.

6 It is noteworthy that this letter, which was written
7 on March 8, 2016, states that it is Defendant's
8 "intention" to move out of the Property and live with her
9 mother, while the house is being staged for sale; the
10 letter is completely imprecise about the timing of
11 Defendant's vacating the Property, or any other
12 conditions that might be relevant thereto, such as
13 whether Defendant will be moving the furniture, or serve
14 as any sort of reliable basis that Defendant had in fact
15 vacated the Property. And it clearly implies, if it does
16 not directly state, that as of the date of the letter,
17 Defendant in fact resides at the Property, which is
18 consistent with the February 27 and February 28 emails to
19 Plaintiff, and the March 8 email exchange between Roesner
20 and Defendant.

- 21 • Lastly, on March 14, Plaintiff and Roesner exchanged
22 emails about the issue of Defendant's intention to vacate
23 and sell the Property. At 5:26 p.m., Plaintiff wrote to
24 Roesner, "[p]lease send the title report and loan
25 application which indicates this is not her residence
26 **anymore.**" *Id.* at Ex. R-8 (emphasis added). At 6:21p.m.,
27 Roesner replied:

1 The loan application was sent separately but
2 here is the document she signed. Also, I did
3 one better and had her **create** a letter of
4 explanation about her occupancy as well.

5 (attached) The home as I mentioned yesterday is
6 being staged for sale and I talked to the Real
7 Estate agent to confirm all that too.

8 Id. at Ex. R-9 (emphasis added). Defendant entered a
9 listing agreement with Mr. Buck; however, the Property
10 was never actually listed for sale, either prior to the
11 closing of the Loan or afterward, as Defendant said she
12 would do, which would have been a simple detail for
13 Plaintiff to determine or inquire about. Decl. Judd
14 Kessler Opp'n Mot. Summ. J. Ex. 2, at 21-22, ECF No. 153.

15 **2. Plaintiff Cannot Show That He Was Justified in**
16 **Relying on Defendant's Representation Regarding**
17 **Her Residence.**

18 Based on the foregoing, Defendant's MPSJ asserts that
19 Plaintiff cannot demonstrate justifiable reliance on any statement
20 that the Property was not Defendant's residence during the period
21 when the Loan was being negotiated, because numerous statements
22 made to him demonstrate the opposite--that he well understood that,
23 at the time, Defendant *did* occupy the Property as her residence.
24 Plaintiff counter-argues that there is no evidence of his
25 "knowledge" of Plaintiff's pre-Loan residence, other than the, to
26 Plaintiff's mind, disputed March 8 Letter. Moreover, Plaintiff
also asserts that, in any event, he was perfectly justified in
believing and in relying on Defendant's numerous statements about
the purpose of the Loan, and her intention to vacate the Property
and promptly to list and sell it.

27 It is apparent to the Court that there are actually two
28 distinct but related questions: Did Plaintiff actually and

1 justifiably rely on statements that Defendant had vacated and did
2 not currently reside at the Property prior to the closing of the
3 Loan? And if the answer to the first question is "No," can
4 Plaintiff claim actually and justifiably to have relied on
5 statements that Defendant "intended" to vacate the Property and
6 live with her mother, to have the Property listed for sale, or that
7 she was obtaining the Loan for business purposes?

8 Certain as Defendant's counsel may be to the answer to these
9 questions, the Court is very mindful that at summary judgment, the
10 Court is to view the evidence in the light most favorable to the
11 non-moving party, and may not weigh the evidence. *Anderson*, 477
12 U.S. at 255. And although the Court is not prohibited from relying
13 on inferences to establish that there is no genuine issue of
14 disputed material fact as to a claim, it must not indulge an
15 inference to reach a conclusion on summary judgment if there is a
16 counter inference that would also be plausible. See *id.* In other
17 words, the Court must avoid indulging in inferences unless the
18 Court is confident that no reasonable trier of fact could reach a
19 contrary conclusion.

20 All that having been said, once the moving party has come
21 forth with evidence and arguments sufficient to show that there
22 appears to be no genuine issue of disputed material fact on a
23 claim, the non-moving party must come forward with evidence and
24 argument demonstrating the existence of a genuine issue of disputed
25 fact, via opposing evidence or resort to an inference with
26 sufficient factual and legal support that a trier of fact might
27 plausibly so conclude. *Celotex Corp. v. Catrett*, 477 U.S. 317,
28 323-24 (1986). Mere statements of "opposition" or unsupported

1 factual allegations, or resort to statements of alleged "fact" that
2 are simply contrary to the established record, will not suffice.
3 See *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("The
4 subsequent presentation of conclusory allegations unsupported by
5 specifics is subject to summary dismissal, as are contentions that
6 in the face of the record are wholly incredible.") (citations
7 omitted); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
8 922 (9th Cir. 2001) ("[C]onclusory allegations unsupported by
9 factual data are insufficient to defeat . . . [a] summary judgment
10 motion.").

11 Viewed through this lens, it is impossible for the Court to
12 conclude that Plaintiff did not actually know that Defendant was
13 residing at the Property during the time that the Loan was being
14 negotiated.

15 And this inquiry is not even a matter of deciding whether
16 there were sufficient "red flags" that were known to Plaintiff that
17 could have or should have cast doubt on the proposition that the
18 Property was not Defendant's residence during the period when the
19 Loan was being negotiated. Rather the February 27 and 28 emails
20 from Roesner, that described the Property as Defendant's longtime
21 home, and stated that, since the house was now too big for her, the
22 children having moved out, she was expecting to list and sell the
23 house, confirmed that, as of that date, it was her residence. The
24 March 8 email exchange between Roesner and Defendant said the same,
25 though it is not clear that Plaintiff reviewed them at the time.
26 Finally, the March 8 Letter, which stated that it was Defendant's
27 intention to move out of the Property, live with her mother and
28 sell the Property, but contained no specifics about the move-out

1 date or related information, confirmed the same--as of March 8,
2 2016, Defendant clearly resided at the Property.

3 And the language that Plaintiff and Roesner used in their
4 email exchange of March 14, two days after Defendant had signed the
5 Loan Documents, strongly indicates that both Roesner and Plaintiff
6 knew that Defendant had been residing at the Property during this
7 time. Plaintiff wrote to Roesner: "Please send the title report
8 and loan application which indicates this is not her residence
9 **anymore.**" Decl. Roesner Ex. R-8, ECF No. 124 (emphasis added).
10 There could be no clearer statement that Plaintiff was well aware
11 that the Property had been Defendant's residence during this
12 period.

13 In the face of this clear record, statements in the Loan
14 Application that the Property had been vacant for two years are
15 simply contrary to facts known by Plaintiff, and could not be
16 relied upon. Similarly, statements in the Loan Application, which
17 was signed four days after the March 8 Letter stating that
18 Defendant "intended" to move out of the Property, that she had been
19 living with her mother for two years, are either factually
20 inaccurate or highly suspicious, should have prompted further
21 inquiry or some other form of verification, and cannot be relied
22 upon by themselves. Similarly for the Declaration of Occupancy and
23 the Occupancy Statement, each also signed four days after the
24 March 8 Letter, that purport to state that Defendant does not and
25 will not reside at the Property and the Property "is/will be" an
26 investment property are either likely false given the contents of
27 the March 8 Letter, or uncertain enough to warrant further inquiry,
28

1 negating Plaintiff's ability blithely to rely on them for the
2 propositions asserted.

3 Nor is the Court persuaded that Plaintiff was justified in
4 relying on the March 8 Letter, which he says he believed had been
5 written a year before based on alleged oral statements of Roesner,
6 as establishing that Defendant had in fact moved out of the
7 Property well before March 8, 2016, or that this assertion even
8 raises a triable issue of fact. First, although the year on the
9 date on the March 8 Letter is slightly smudged, it clearly reads
10 "March 8, 2016." Second, the assertion that Defendant had actually
11 moved out of the Property around March 2015 is entirely
12 inconsistent with the facts presented in the February emails.
13 Third, a good faith belief that Defendant's March 8 Letter was a
14 year old would be completely inconsistent with the language Roesner
15 used in describing the letter in his March 14 email, i.e., that he
16 "had her **create** a letter of explanation about her occupancy as
17 well. (attached)." Roesner Decl. Ex. R-8, ECF No. 124 (emphasis
18 added). One would not speak contemporaneously of having someone
19 "create" a letter that had been written a year prior. And, most
20 importantly, the language of the March 8 Letter stated clearly that
21 it was Defendant's *intention*--vague, and without a deadline--to
22 move out, not that she had moved out, let alone a year ago.

23 This question does not rise to the level of credibility or
24 require us to weigh disputed fact or inferences, such that a trial
25 is necessary to determine disputed facts. Rather, Plaintiff's
26 story is simply and thoroughly disproved by the numerous pieces of
27 evidence to the contrary. Absent some other explanation or
28 additional facts that would create a genuine dispute, or allow for

1 a plausible alternative inference, the Court is convinced that no
2 reasonable trier of fact could conclude other than that Defendant
3 was very well aware that Plaintiff had been residing at the
4 Property while the Loan was being negotiated.

5 Plaintiff asserts that even if he would not be able to
6 justifiably rely on statements that Defendant had vacated the
7 Property and it was not her residence prior to the Loan closing, he
8 should nonetheless be able to rely on Defendant's statements in
9 various documents, including the Loan Documents, to the effect that
10 she intended to vacate the Property and would not be using it as
11 her residence in the future. Defendant counters that in light of
12 the contradictory or at best vague statements that Defendant made
13 concerning when she might vacate the Property, as well as
14 Plaintiff's simply factually inaccurate statements concerning his
15 knowledge of Defendant's use of the Property prior to the Loan
16 closing, he either did not actually rely on any statements
17 concerning future occupancy or at a minimum cannot claim
18 justifiably to have relied on them.

19 The Court agrees with Defendant on this point as well.

20 First, Plaintiff does not support his argument regarding his
21 justifiable reliance on Defendant's statements that she had vacated
22 or would vacate or intended to vacate the Property on any
23 additional documents or communications. In other words, the
24 universe of proof is the same for this issue as it was for the
25 issue whether Plaintiff knew that Defendant in fact occupied the
26 Property during the time the Loan was being negotiated, i.e., the
27 Loan Documents, and the March 8 Letter, as contextualized by
28 communications between Plaintiff and Roesner, i.e., the February 27

1 and 28 emails, and the March 14 emails. So the question is whether
2 this same evidentiary record could plausibly support an assertion
3 that Plaintiff actually and justifiably relied on statements
4 concerning Defendant's post-March 12 (the date of the Loan
5 Documents) occupancy of the Property.

6 In the Court's view, these documents and communication suffer
7 from the same infirmities for reliance purposes with respect to the
8 question of Defendant's "future" occupancy of the Property as they
9 did with respect to the question of Defendant's actual residency in
10 the Property, and Plaintiff's knowledge thereof. The Loan
11 Documents either make historical statements that are patently
12 false, based on other evidence in the record (e.g., Defendant has
13 not resided at the Property for two years (Loan Application),
14 Defendant has no intention of "ever making" the Property her
15 personal residence, even though it clearly had been and was her
16 residence as of at least March 8 (Occupancy Statement)), or that
17 are at once unequivocal and simplistic in a manner that is either
18 thoroughly at odds with other statements communicated to Plaintiff,
19 or questionable given the equivocation of the March 8 Letter, which
20 merely stated, without any effective dates or other deadlines, that
21 Defendant "intended" to vacate the Property, list and sell the
22 Property, and live with her mother in the meantime.

23 Moreover, focusing in particular on the March 14 email
24 exchange between Plaintiff and Roesner, the last pre-Loan closing
25 communication concerning Plaintiff's re-closing requirements for
26 the Loan, makes this point abundantly clear.

27 The language that the parties chose to express the status of
28 Defendant's residence at the Property, then and going forward, is

1 revealing. Plaintiff to Roesner: "Please send the title report
2 and loan application which indicates this is not her residence
3 **anymore.**" As noted previously, this statement clearly implies that
4 Plaintiff was quite well aware that the Property had been
5 Defendant's residence, as the February 27 and 28 emails had
6 attested. Further, the statement requests not verification that
7 Defendant has in fact moved, i.e., some statement or other proof of
8 the actual facts about Defendant's occupancy of the Property, that
9 could be verified or confirmed--rather he requests a statement that
10 the Property is not her residence anymore, which is not only highly
11 implausible, given the admittedly false statements in the Loan
12 Application and other Loan Documents dated as of March 12, but is
13 also vague, and is not, without more, easily subject to objective
14 verification.

15 And the reply from Roesner: "[H]ere is the document she
16 signed. Also, I did one better and had her create a letter of
17 explanation about her occupancy as well (attached)," referring to
18 the March 8 Letter, is also quite curious. First, as previously
19 noted, the use of the word "create" both indicates that the March 8
20 Letter was drafted contemporaneously, and that it was intended not
21 so much to describe the current status as to satisfy a pre-existing
22 requirement for the Loan, whether accurate or not. Second, the
23 language of the email is even more puzzling in light of the
24 statements in the March 8 Letter, that it was her *intention* to
25 vacate the Property and that she *planned* to live with her mother
26 *[i]n the interim*. These statements, which ostensibly were provided
27 to support the statements in the Loan Application regarding
28 Defendant's residency or, alternatively, were provided to offer

1 some support for the proposition that she had moved out, or was
2 committed to doing so, perform no such function. The statements do
3 not confirm that she has moved out--they confirm the opposite; they
4 do not confirm that she has committed to move out as of a certain
5 date--they do the opposite, in that they are vague and non-
6 committal as to timing or other details; and they are at best
7 confusing in that they are dated as of March 8, and contradict the
8 statement in the Loan Documents, dated March 12; and they are
9 delivered to Plaintiff on March 14.⁶

10 And why would Plaintiff need a statement regarding Defendant's
11 non-residency at the Property? Precisely because he knew that this
12 was an issue, given the February emails that, like the March 8
13 Letter, confirmed that she did in fact live there, and offered an
14 at best non-committal promise of intention to move.

15 Given these demonstrable and, in the Court's view,
16 irreconcilable inconsistencies, Plaintiff's unquestioned and
17 uncritical "reliance" on Defendant's statements concerning her
18 future occupation of the Property is not justifiable. At a
19 minimum, these inconsistencies raised exactly the sort of "red
20 flags" that a lender should have noted, and that should have
21 sparked further inquiry. See *Heritage Pac. Fin., LLC v. Machuca*
(*In re Machuca*), 483 B.R. 726, 736-37 (B.A.P. 9th Cir. 2012).

23

24

⁶ The Court acknowledges that Roesner's March 14 email to Plaintiff went on to state: "The home as I mentioned is being staged for sale and I talked to the real estate agent to confirm all that too" and that such statements concerning staging are consistent with statements in the February emails about an intention to sell the Property. But such statements do not resolve the overriding inconsistencies and uncertainties that exist because of the inaccurate and vague statements concerning Defendant's residence at the Property. And they certainly do not excuse the failure to make any reasonable inquiries on this important question.

1 Plaintiff's insistence on obtaining documents containing
2 written statements concerning Defendant's non-occupation of the
3 Property as her residence does not alter the Court's conclusions on
4 this point. To the contrary, Plaintiff's insistence on this point
5 highlights the admitted fact that Plaintiff, far from being a
6 "naif" in these matters, was an experienced and sophisticated real
7 estate lender. Plaintiff well understood the importance of making
8 a record (a) that Defendant did not and would not reside at the
9 Property, to avoid complications arising from California's anti-
10 deficiency protections for borrowers, and to preserve a potential
11 claim for fraud, and (b) that the Loan was made for a "business
12 purpose" to avoid complications arising from the Truth in Lending
13 Act ("TILA")⁷. But, as this case demonstrates, mere wishing does
14 not make it so.

15 Rather, given the false statements, vagaries and
16 inconsistencies in this record concerning Defendant's future
17

18 ⁷ Although not dealt with expressly by either party, the Court is not
19 dissuaded from its conclusions by the statements in the Business Purpose
20 Statement that the purpose of the Loan was "Business" and not "consumer."
21 First, as discussed briefly at section VI. below, the question whether a
22 transaction is or isn't subject to TILA turns on, among other issues, the
23 purpose of the transaction, but that is a complex and fact-driven analysis,
24 which is not resolved simply by a borrower's statement that the purpose of a
25 loan was "business" and the property involved was held for investment. And this
26 case demonstrates why: the Business Purpose Statement stated without any
27 explanation or elaboration, that the purpose of the Loan was for "business" and
28 that the Property was and would be for "investment," notwithstanding the
unequivocal statements that the Property had been and was as of March 8,
Defendant's residence. And just as clearly, in reality the Property had no
commercial or investment purpose whatsoever--it had not been rented, nor would
it be, and any commercial purpose attributable to the Property (i.e., as a home
office for Defendant's business) was undercut by the fact that the Property had
been Defendant's residence for years. Indeed, as the February 28 email and the
March 8 Letter directly show, the only sense in which the Property would have a
"business" or "investment" purpose was the possibility that the Property might
contain substantial equity that could be realized at sale. To "rely" on that
factor as establishing a "business purpose" or "investment" character to the
Property or to a loan secured thereby is to expand those concepts into
absurdity.

1 residence at the Property, it is clear to the Court that what
2 Plaintiff sought via the numerous statements he required concerning
3 Defendant's residence was not confirmation of facts that were a
4 pre-condition to his lending, given the at best muddled and
5 uncertain record concerning Defendant's residence, of which
6 Plaintiff was certainly aware, as much as certainty that he had
7 "papered the file" with numerous statements concerning the
8 residency issue, true or not, consistent with the other
9 communications or not, and confirmed and verified or not, to permit
10 Plaintiff to attempt to avoid the requirements of TILA, and to
11 preserve a fraud claim against his borrower, should the transaction
12 "go south." While such maneuvering is certainly understandable as
13 a business leverage proposition, such behavior is entirely
14 inconsistent with the requirements placed upon a party making the
15 serious and consequential claim that he was defrauded and his debt
16 should be nondischargeable in bankruptcy.

17 For all of these reasons, and because the Court is convinced
18 that no rational trier of fact could reasonably conclude otherwise,
19 the Court concludes that Plaintiff will not be able to demonstrate
20 that he justifiably relied on statements concerning Defendant's
21 occupation of the Property as her residence, and summary judgment
22 is appropriate on Plaintiff's First Claim for Relief.

23 **VI. MOVANT'S TILA DEFENSE**

24 Finally, Defendant argues that summary judgment is appropriate
25 because Plaintiff violated TILA in making the Loan. 15 U.S.C. §
26 1601 et seq. While there is no limitations period for the
27 assertion of TILA as a defense that would prevent Defendant from
28 raising such defense, and Plaintiff, as a creditor who originated

1 the Loan through a mortgage broker, is subject to TILA, it is not
2 clear whether TILA applies to this transaction. See 15 U.S.C. §§
3 1602, 1640(h); *In re Johnson*, No. 09-52288-ASW, 2010 WL-4668353, at
4 *4 (Bankr. N.D. Cal. Nov. 9, 2010) (citation omitted).

5 TILA provides an exemption for "[c]redit transactions
6 involving extensions of credit primarily for business, commercial,
7 or agricultural purposes." 15 U.S.C. § 1603(1). Plaintiff argues
8 that TILA does not apply to the transaction between the parties
9 because the transaction was made, at least ostensibly, for
10 "business" purposes, citing to the Loan Documents, which so stated,
11 and to the March 8 Letter Defendant sent to Plaintiff supporting
12 the same. Defendant counters that the Property was Defendant's
13 personal residence and the Loan was not really for business
14 purposes, so, therefore, the transaction between the parties is not
15 exempt from TILA.

16 However, this inquiry is largely fact-based and requires a
17 case by case analysis. *Daniels v. SCME Mortg. Bankers, Inc.* 680 F.
18 Supp. 2d 1126, 1129 (C.D. Cal. 2010) (citing *Thorns v. Sundance
Props.*, 726 F.2d 1417, 1419 (9th Cir. 1984)). Although the parties
19 have facially argued their respective positions, the issue has not
20 been sufficiently briefed or argued to provide the Court with a
21 basis for determining whether there are grounds for summary
22 judgment.

24 Further, as set forth in sections V.A. through V.C. supra, the
25 Court is granting summary judgment on the issues of Defendant's
26 alleged false statements concerning her income, the value of the
27 Property and her residence at the Property and purpose of the Loan.
28 These matters having been resolved in Defendant's favor, it is no

1 longer necessary for Defendant to assert a TILA-based defense, and
2 this issue has become moot.

3 Accordingly, the Court determines as moot that portion of
4 Defendant's MPSJ that seeks to assert a defense based on TILA.

5 **CONCLUSION**

6 The Court does not lightly grant partial summary judgment in
7 this matter, mindful of two very important concerns.

8 First, the Court acknowledges that summary judgment, which
9 requires the Court to determine that there is no genuine dispute of
10 material fact on the question presented, and concludes the matter
11 on that question without a trial, is granted relatively rarely on
12 matters involving nondischargeability claims under § 523(a)(2) of
13 the Bankruptcy Code, which requires the Court to make
14 determinations on matters that are at once fact-specific and
15 elusive: an alleged fraudster's intent and an alleged victim's
16 understanding and reliance. But, for the reasons set forth at
17 great length above, the Court is convinced that this is that
18 perhaps rare case in which critical elements of nondischargeability
19 claims have not been and, on this record, cannot be established,
20 and summary judgment is appropriate.

21 Second, the Court also acknowledges the challenges inherent in
22 negotiating and documenting loan transactions secured by real
23 property in the secondary market, involving perhaps more frequently
24 small, non-institutional lenders and less sophisticated borrowers.
25 The Court further acknowledges the tension between the need quickly
26 and expeditiously to negotiate and document such transactions and
27 the pressures on cash-needy borrowers and wary lenders reliably to
28 establish their legal relations under the proposed transaction,

1 including anticipating their relations should the borrower default.
2 And it is clear that these sorts of transactions require resort to
3 routine practices and established forms of documents that, in many
4 instances, facilitate the quick approval and funding of loans.

5 But where, as in this case, the information provided in those
6 forms inexplicably and repeatedly contradicts reality, including
7 for example with respect to the borrower's ability to repay a loan,
8 or the borrower's use of the property securing the loan, those
9 forms do not serve to confirm or verify conditions requisite to
10 funding; rather they attempt to skirt the requirements of federal
11 and state law enacted to protect the interests of borrowers, and to
12 fabricate claims of fraud to shift the risk of non-payment in case
13 of a default. And as this case pointedly demonstrates, no law,
14 bankruptcy or non-bankruptcy, ought to countenance such
15 manipulation.

16 Defendant's MPSJ is GRANTED as to the First Claim for Relief
17 in that, based on the undisputed facts, Plaintiff cannot show that
18 he justifiably relied on Defendant's statements regarding her place
19 of residence.

20 Defendant's MPSJ is also GRANTED as to the Second Claim for
21 Relief in that, based on the undisputed facts, Plaintiff cannot
22 show that Defendant made a fraudulent misrepresentation regarding
23 the value of the Property.

24 Defendant's MPSJ is also GRANTED as to the Third Claim for
25 Relief in that, based on the undisputed facts, Plaintiff cannot
26 show that he reasonably relied on Defendant's statements regarding
27 her income.

28

1 Defendant's MPSJ is DENIED as moot in regard to whether
2 Plaintiff reasonably relied on Defendant's statements regarding the
3 Property's value and to the extent that she relies on a TILA
4 defense.

Finally, Plaintiff's Objection and Motion to Strike are DENIED. The Court will enter an Order Granting in Part and Denying in Part Defendant's Motion for Partial Summary Judgment concurrent with the filing of this Opinion.

END OF OPINION

1 **COURT SERVICE LIST**
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